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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
JACK W. HUSSEY,
Respondent.
No. 342.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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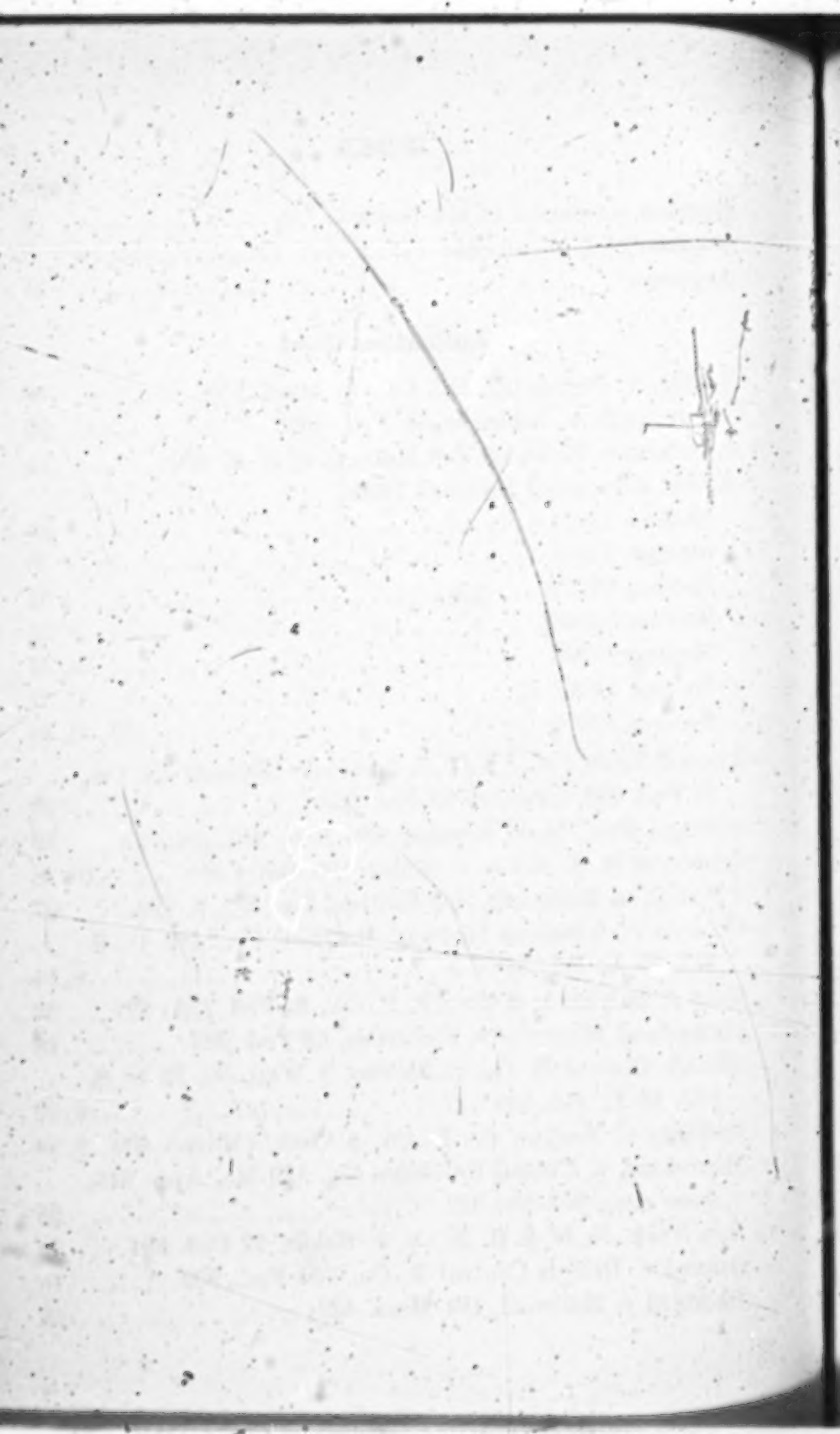

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SUPPLEMENTAL BRIEF FOR RESPONDENT.

Because of statements made by petitioner, in its "Restatement of the Facts and Argument" in its supplemental brief, which, in the opinion of respondents' counsel, give an erroneous impression of the facts of the case in certain particulars, respondent deems it necessary to make a further statement of the facts in addition to respondent's "Statement of the Case" in his original brief in opposition to the petition for the writ.

FURTHER STATEMENT OF THE FACTS.

Respondent, as plaintiff below, showed, in his case in chief, that he was a passenger upon petitioner's westbound passenger train, operated on its main line from Louisville, Kentucky, to St. Louis, Missouri, and that about 1:30 a. m. on September 3d, 1927, while respondent was asleep in his berth, the train left the main track and came into violent collision with a freight train standing upon a sidetrack, by reason whereof respondent sustained the injuries for which he sued (Tr., pp. 48, 49). Having adduced this evidence, and evidence touching the extent and permanency of respondent's injuries, respondent rested his case (Tr., p. 61).

Petitioner then adduced evidence in an effort to explain the casualty consistent with due care on its part. This evidence tended to show the following:

At the point where the collision occurred, and where petitioner's tracks extended apparently east and west, a track of the Evansville Company connected with petitioner's main track, leading off toward the west on the south side of petitioner's track and curving to the south, the connection being known as Mine Junction (Tr., pp. 77, 78, 87). At this point there was a switchstand and signal device so constructed that when the switch lever was thrown to open or close the switch, it operated, by means of a throw rod, a signal device so as to change the signal light from green to red, or vice versa (Tr., pp. 109, 110).

On the night in question, a short time prior to the time when petitioner's westbound passenger train No. 2, upon which respondent was a passenger, was due at Mine Junction, a freight train of the Evansville Company was standing on the sidetrack leading off from this switch. The crew of this freight train consisted of Hughes, the conductor, an engineer, a fireman, and one Carson and one Stanley, the brakemen (Tr., p. 78). The freight train was headed east, the engine being in front of the train and about three car lengths from the switch (Tr., p. 81).

Hughes testified that he went into a telephone booth near the switch and called petitioner's dispatcher at Preston for running orders to Oakland City, a point about ten miles east on petitioners' main line; that the dispatcher gave him such running orders, and that he then said to Carson, who was standing near by, "All right," meaning for him to throw the switch; but that he then looked at his watch and told Carson to go to the engine and ask the engineer if they could make it to Oakland City before No. 2 would arrive there; that Carson went to the engineer, made this inquiry and came back and said "No," and he (Hughes) then called the dispatcher and told him they would remain where they were until No. 2 had passed (Tr., pp. 79, 80). Hughes said that when he came out of the booth he saw that the light in the signal target showed green, indicating that the switch was closed and that the petitioner's main-line track was clear, and then walked a few feet away and sat down and

remained until passenger train No. 2 arrived, "took the switch" and crashed into the freight train (Tr., p. 80).

Other evidence for petitioner went to show that the throw rod leading from the switch stand to the signal device had become disconnected from the crank of the signal stand; that when Carson opened the switch, by operating the switch lever, the throw rod should have turned the crank of the signal target so as to display a red light; but that by reason of the fact that the throw rod was disconnected from the crank, the light did not turn but continued to show green (Tr., pp. 83, 84).

Carson testified that when Hughes stepped from the telephone booth and called to him, saying "All right," he (Carson) unlocked the switch and threw it, opening it onto the sidetrack, saw that the points fitted up all right, but paid no attention to the light; that being told by Hughes to ask the engineer if they could make it to Oakland ahead of No. 2, he went to the engine about three car lengths west, made such inquiry of the engineer and was told by the engineer that they had better not try it. He said that he turned around, with nothing on his mind but lining up the switch and noticed the green light (Tr., p. 95). He said:

> "Turned around, not thinking—nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch, never thought practically anything about it, just thinking

one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was" (Tr., p. 96).

On cross-examination Carson testified that when he walked back from the engine any sort of examination, other than simply looking at the light, would have shown the fact that the switch was open; that he had plenty of time to look at the switch points if he had wanted to, but simply sat down, as did the other members of the crew, and waited for the passenger train. He also said that the switch light involved was a Southern light and was on Southern property (Tr., p. 98).

Other evidence for petitioner showed that the throw rod extending from the switch stand to the signal light was found, after the accident, disconnected from the crank of the signal stand (Tr., pp. 83, 108, 118). Such evidence also showed that this crank was held to the throw rod merely by means of a small set screw which had failed to hold on this occasion. There was no evidence as to why this little set screw had failed to hold the crank to the throw rod except such as may be inferred from the testimony of petitioner's witness Vieth, petitioner's supervisor of bridges and buildings, who said that early on the morning after the accident he made an examination of the various parts of the switch and signal device and observed a fresh crack in the crank about opposite the set screw, and that "this crack will take the tension off of the sides and finally let that (the crank) drop off."

On cross-examination, Vieth testified:

"Q. Now, this thing—thing turning or not turning; I will ask you, as an engineer, if it could not have been prevented by having a bolt hole drilled through the bottom of the shaft, according to the design, with the crank properly secured to the shaft by means of a bolt, couldn't it be prevented?

A. Well, yes, if there was a bolt hole in, but that might have been a pattern that was made before they put these bolt holes in. That is not the only one that was on the road.

Q. But by drilling a bolt hole in there, according to the design, and the crank properly secured to the shaft by means of a bolt, that would have prevented this sort of occurrence, wouldn't it?

A. Well, yes, it would.

Q. And another way you could have prevented it would be by having a counter bore in the shaft, properly countered or centered, so as to receive the set screw; is that right?

A. Well, sure, sure, if that had been put on that way, but possibly when that there was made, why, they didn't fix them that way.

Q. And another way it could have been prevented was by having an automatic block signal system?

A. Well, of course, there—all roads got that.

Q. That is what they are for, though, isn't it?

A. Well, yes, but they fail.

Q. Yes. All right" (Tr., p. 114).

One Larson, petitioner's section foreman, testified in behalf of petitioner that, in the performance of his duty, he

inspected this switch on September 2nd and discovered nothing out of order. But on cross-examination he admitted that two or three days before the accident he found that the bridle rod leading from the switch stand to the switch points had been "hit right in the middle by something dragging on the train." He first said that this had occurred more than two or three days before the collision, then said it was "just two or three days," and finally admitted that "it might have been September 1st" (Tr., p. 123). And, after testifying further on redirect examination, he testified on recross-examination that he found one of the throw rods damaged and took it off and replaced it. On further redirect examination he said that the damaged throw rod was not the one running from the switch to the light stand (Tr., p. 125).

SUMMARY OF ARGUMENT.

I.

Since respondent, plaintiff below, rested his case upon proof adduced by him that he was a passenger upon petitioner's train, and that while he was such passenger petitioner permitted the train to come into violent collision with another train, whereby respondent was injured, thus making a prima facie case, the burden was cast upon petitioner to show that such injury resulted from inevitable accident or from some cause against which human care and foresight could not have provided. And while the petitioner came forward with evidence for the purpose of explaining the casualty and attempting to exonerate itself, the question of petitioner's negligence remained one for the jury. It was for the jury to say, in the light of all the testimony, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating corcumstances.

Gleeson v. Virginia Midland Railway Co., 140 U. S. 443, 35 L. Ed. 548, and other authorities cited under Point I of Summary of Argument in respondent's brief in opposition to the writ.

II.

Petitioner's own evidence fully warranted the inference that petitioner itself was negligent with respect to the

equipment and maintenance of the mechanism of the switch stand and signal light at the switch point in question, and that petitioner was negligent as well in failing to take any precautions itself to see that due care was exercised in respect to the operation of its own switch and signal device, constituting an instrumentality of carriage affecting the safety and security of petitioner's track for the transportation of its own passengers.

III.

There was abundant evidence of negligence on the part of the employes of the Evansville road.

IV.

Since the switch and signal device in question was a part of petitioner's own equipment, for the operation of its trains, and constituted as much an instrumentality of carriage as did petitioner's cars and tracks, petitioner, having taken no precautions to see that such instrumentality was carefully and properly operated, is liable for injuries to its own passengers due to the negligence of the agents and servants of another company connecting with and jointly using petitioner's tracks, in the operation and management of such switch signal for the purpose of giving signals to those in charge of defendant's train upon which respondent was a passenger.

McElroy v. Nashua etc. R. Co., 4 Cush. (Mass.) 400;
Illinois Central R. Co. v. Barron, 5 Wall. 90, 72 U. S. 412, 18 L. Ed. 591;

Denver & R. G. R. Co. v. Roller, 100 Fed. 738;
Chicago Rys. Co. v. Kramer, 234 Fed. 245;
And other authorities cited under point II of respondent's brief in opposition to petition for the writ.

V.

Nothing in the Indiana statutes pleaded, or otherwise suggested by petitioner's counsel, can operate to relieve petitioner from liability to its own passenger for injuries received by reason of the negligent operation of its own switch and signal device, constituting an instrumentality of carriage appurtenant to its own main line over which it was carrying respondent as a passenger; since neither by these statutes or otherwise was petitioner required or authorized to turn over to any connecting road the operation and management of such switch and signal device, without exercising any supervision thereover, and without taking any precautions whatsoever to see that such instrumentality was carefully and properly operated for the protection of its own passengers being transported by it over such main line. The authorities cited by petitioner in this connection are readily distinguishable from the case at bar.

ARGUMENT.

I.

Petitioner, in its supplemental brief, begins its "Restatement of the Facts and Argument" with the statement that "Undoubtedly the primary cause of the accident was a fresh break in the mechanism which connected the signal light with the switch lever."

Respondent challenges this statement on more than one ground. In the first place, there was no showing, even by petitioner's evidence, that there was any fresh "break" in the mechanism, i. e., in either the throw rod running to the switch stand or in the crank of the switch stand to which the throw rod was connected. The word "break" does not appear anywhere in the testimony. There is simply the testimony of Vieth, petitioner's employe, an interested witness, called by petitioner in defense, to the effect that his examination, after the accident, showed a fresh crack in the crank of the signal stand, where the crank fitted onto the throw rod extending over from the switch stand. And he gave it as his opinion that this crack would take the tension off and finally let the crank drop off.

We respectfully say that the petitioner, in its supplemental brief, makes the mistake of assuming that the matters so testified to by its witness are to be taken as facts absolutely established in the case. Such testimony was adduced by the petitioner after respondent had made a prima facie case for the jury, in an effort by petitioner to

explain the casualty consistent with due care on its part, and thus attempting to exonerate itself from liability. There was no other testimony as to the existence of any such crack, nor was there any evidence whatsoever adduced that the set screw designed to hold the crank to the throw rod failed to perform its function because of the existence of any such crack, if any. This witness simply gave it as his opinion that the existence of such a crack would take the tension off so as to prevent the set screw from holding the crank to the throw rod and thus let the crank drop off. Nor is there a word of testimony in the record as to when this crack occurred, if any such crack ever existed.

The jury were entitled to disbelieve and wholly reject the testimony of this interested witness as to the existence of any such crack, as well as to what effect it might have. But not only this, Larson, petitioner's inspector, ultimately admitted that not more than two days before the collision, and possibly a day before, a dragging beam upon a train had so damaged the apparatus at this switch as to injure the bridle rods running to the switch points, and also one of the throw rods, so as to make it necessary to remove the latter. This was dragged out of the witness on cross-examination by respondent's counsel. He first said that his inspection on the day before the accident revealed nothing whatsoever wrong with the switching and signaling device, but he was finally forced to admit that shortly prior to the casualty here in question a great deal of dam-

age had been done to this apparatus. One throw rod was so badly damaged that it had to be removed. And if there was in fact any crack in the crank fastened to the other throw rod, the jury could readily infer that this was caused by the dragging beam a day or two before, which badly damaged other parts of the same mechanism, and that Larson had negligently failed to discover it. It would be much more reasonable to suppose that the crack, if it existed at all, was caused by this violence rather than from the mere throwing of the switch lever, since the strain upon the throw rod in turning the crank of the signal light could not have been great, and the crank had never been thereby previously injured. The jury, if they believed Vieth's testimony at all, were entirely warranted in inferring that if there was any such crack it resulted from the previous violence mentioned, and that petitioner's inspector, Larson, would have discovered it on September 1st if he had made a proper and careful inspection of all parts of the mechanism.

Indeed, while we refer to this evidence because of the fact that petitioner insists upon treating this case as though the matters testified to by its witnesses are to be taken as facts absolutely and conclusively established in the case, such discussion so provoked by petitioner's learned counsel is beside the case. **Respondent pleaded and tried this case upon the res ipsa loquitur rule. Respondent, as plaintiff below, neither alleged any specific acts of negligence nor attempted to prove any.** Respond-

ent made a case for the jury by simply showing that he was a passenger on one of petitioner's passenger trains and that petitioner negligently allowed the train to leave its main track so as to come into violent collision with a freight train upon a siding whereby respondent was injured. Respondent thereby made a perfect case under the res ipsa loquitur rule. And respondent having made such prima facie case, the burden was at once cast upon the petitioner to bring forward evidence, if it could, to explain the casualty to the jury consistent with due care on its part. And when the petitioner did this, and its evidence was all in, the case remained one for the jury. **It was for the jury to say, in the light of all the testimony, whether the petitioner had successfully carried this burden and had shown, to the jury's satisfaction, exonerating circumstances warranting a verdict in its behalf. And when the case was put to the jury, as it was, on a proper charge by the learned District Judge, such questions of fact were concluded by the jury's verdict and are not now open to review.**

In Gleeson v. Virginia Midland Railroad Co., 140 U. S. 443, 35 L. Ed. 548, this Honorable Court, among other things, said:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the

act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matters of defense, and it is for the jury to say, in the light of all the testimony and under the instructions of the Court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

Such has been the uniform, unbroken ruling of this Court in passenger and carrier cases, as will appear from further authorities cited under point I (p. 15) of respondent's "Summary of Argument" in respondent's brief in opposition to petitioner's petition for the writ.

In this connection petitioner, in its supplemental brief, refers to **Buckland v. Railroad**, 181 Mass. 3, 62 N. E. 955, where a switch failed to operate because of a broken pin in a device connecting it with a switch tower. That case, however, is here nowise in point for the reason that **the plaintiff did not rest his case by showing facts giving rise to the application of the res ipsa loquitur rule, but went further and attempted by his own evidence to show the cause of the casualty.** The Court, at the outset of the opinion, said:

"If we assume that the plaintiff was a passenger, and might have rested his case by showing that the car in which he was riding was derailed, thus mak-

ing out a prima facie case, he did not choose to do so, but went on and showed by his own witnesses just how the accident happened."

II.

In this connection also petitioner seeks to make it appear that it should not be held liable because of the fact that one of its witnesses testified that the switch and signal device was "standard equipment." We respectfully say that the mere fact that one witness made this statement is now of no consequence in the case. For one thing, the plaintiff, as said above, had made out a perfect prima facie case for the jury, which could not possibly have been wiped out or destroyed by oral testimony adduced by defendants so as to have warranted the trial court in sustaining a motion for a directed verdict. The jury was not required to believe the statement of this witness that the equipment was standard equipment; nor does the term "standard equipment," under the circumstances, indicate that petitioner was free from fault in continuing to use old equipment of this character, in which the connection between the throw rod and the crank of the light target was made simply by means of a small set screw designed to hold the throw rod to the crank by friction merely; a method of construction which, upon the facts of this record, was evidently old and out of date at the time. While petitioner's witness Vieth said that "this switch" was standard equipment (Tr., p. 115), on cross-examination, when asked

if the casualty could not have been prevented "by having a bolt hole drilled through the bottom of the shaft, according to the design with the crank properly secured to the shaft by means of a bolt," Vieth said:

> "Well, yes; if there was a bolt hole in it, **but that might have been a pattern that was made before they put these bolt holes in. That is not the only one that was on the road.**"

From this it may readily be inferred that this old type of switch and signal apparatus, in which the throw rod was held to the crank merely by a little set screw, was no longer in general use; that it was of an old pattern in use before they began putting bolt holes in. And when the witness said that it was not the only one on the road, it is obvious that this old type was not in general use even on petitioner's own line. Again, the witness testified as follows:

> "Q. And another way you could have prevented it would be by having the counterbore in the shaft properly countered or centered so as to receive the set screw, is that right?
>
> A. Well, sure, sure, if that had been put on that way, but possibly when that there was made, why they didn't fix them that way."

This very clearly shows that the method of counterboring the shaft to receive a set screw, so as to make the connection secure, was a well-known one and one that

had been in common use, but that this particular type of equipment was an old one that had been made before safer equipment became in general use—equipment in which such a connection was made either by means of a bolt through the shaft or by countersinking the shaft to receive a set screw or bolt so as to make the connection firm and safe.

Consequently we say that, upon petitioner's own evidence, a jury would be amply warranted in finding that petitioner had not exercised the highest degree of care, the utmost human foresight and diligence with respect to the safety of this signalling device, upon the proper operation of which depended the lives and safety of those whom it undertook to transport as passengers over its main line.

The authorities cited by petitioner in its supplemental brief in support of its theory of nonliability because one of its witnesses said that this was standard equipment, deserve but passing comment. In **Ozanne v. Illinois Central R. Co.**, 151 Fed. 900, it was held that the failure to equip a dressing room of a sleeping car with seats and handholds to prevent one from being thrown as the train passed around curves, did not constitute negligence per se. In **Adduci v. Boston El. Ry. Co.**, 15 Mass. 336, the plaintiff, alighting from an open street car, struck his foot on a wheel guard or sheath extending over a part of the running board, causing him to fall. It was held that negligence could not be predicated upon the use of such wheel guards. **Homestead Mine Co. v. Fullerton**, 69 Fed. 923, is

a master and servant case, having here no application whatsoever. Obviously, none of these cases are in point on the facts of the instant case.

III.

Petitioner also contends in its supplemental brief that there was no evidence of negligence on the part of the employes of the Evansville road. Again, this matter is not one that ought to require any discussion, since, as we have shown in our brief in opposition to the petition for the writ, and shall undertake to further show herein, the petitioner is liable for any negligence of the employes of the Evansville road, it is quite obvious that, since plaintiff's case proceeded upon the res ipsa loquitur theory, the question of the negligence of the employes of the Evansville road was a matter for the jury. On the other hand, the facts hereinabove stated show, we submit, the very plainest sort of negligence on the part of the agents and servants of the Evansville road in respect to the operation of the switch and signal device on the occasion in question.

When Hughes, the conductor of the freight train of the Evansville road, telephoned to petitioner's train dispatcher at Preston for running orders east to Oakland and received such running orders he stepped out of the telephone booth and said to Carson, "All right," meaning for Carson to throw the switch to allow the freight train to proceed out eastwardly on petitioner's main-line track. And Car-

son immediately threw this switch. It appears from petitioner's evidence that what occurred was that, when the switch was thrown, the throw rod extending to the signal standard, being disconnected from the crank at the base thereof, did not turn the framework of the light standard so as to change the glass in front of the light from green to red. Carson said that when he threw the switch he examined the switch points and saw that they fitted up properly, but paid no attention to the light at all. Just then Hughes told him to walk up to the engine and ask the engineer if he thought they had time to make it to Oakland ahead of No. 2; Carson immediately walked to the engine, approximately about three car lengths, or about one hundred and twenty feet away, spoke to the engineer, and the engineer told him they had better not try it. **He thereupon immediately turned around and saw that the light at the switch was green.** He had just thrown this switch, opening it into the sidetrack. He knew that with the switch open the light should show red as a danger signal to the operators of trains on petitioner's main line. He knew that the conductor, Hughes, was waiting to go out onto the main line—had just received running orders over the main line and was waiting for Carson to tell him what the engineer had to say as to whether they could make it in time to Oakland. He walked back to about the switch point and told Hughes that the engineer said they had better not try it, and he and Hughes and Stanley, the other brakeman, then calmly

sat down near by and waited until the passenger train arrived, took the siding and plunged into the freight train. It could have taken Carson but a few seconds to walk from the switch point to the engine, and it appears from his testimony that he was surprised, upon turning around, to observe that the light was green. He says that he thought the conductor or the other brakeman must have closed the switch; but he knew that Hughes was waiting for his report from the engineer, and he did report to Hughes. It is entirely obvious that he failed to exercise even ordinary care and prudence, to say nothing of the very highest degree of care, in paying no further attention to this switch or signal light under such circumstances. Certainly, if he had exercised the slighest care he would have looked to see whether this switch was in fact closed, knowing, as he did, that the conductor could have had no object or purpose in closing the switch, or directing that it be closed, until he (Carson) had reported what the engineer had to say.

On direct examination Carson said:

> "Turned around, not thinking nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch, **never thought practically anything about it**, just thinking one or the other of them had lined it back; walked up there and sat down and never a one of us said a thing about the switch, and there we was." (Emphasis ours.)

And on cross-examination of this witness the following occurred:

"Q. But any other sort of examination while you were walking over, had you made it, would have determined the fact that it was open for the Southern?

A. Absolutely, but I just crossed over the track and walked up the other side of the track and sat down.

Q. You had plenty of time to look at the switch points, if you had wanted to?

A. I did."

He had just opened this switch. He knew that the passenger train was due, as he said, in a very short time. It was his imperative duty to close this switch. And it was the imperative duty of Hughes, who had ordered the switch to be opened, to see that it was closed. But neither of them gave a single glance at the switch or switch points. And Hughes says that when he stepped out of the telephone booth he, too, noticed the green light, **but paid no further attention to it.**

It was clearly Carson's duty, in the first place, when he threw this switch and opened it into the sidetrack, to see that the light target displayed a red light so as to properly warn traffic on the main line. This he did not do. **He admits that he threw the switch without paying the slightest attention to the light.** And added to this, when, a few seconds later, he turned around, and to his surprise saw that the light was green, whereas he expected to find

it red, he dismissed the matter from his mind altogether, without examination or inquiry of any sort whatsoever.

We respectfully submit that such conduct by no means measures up to that of ordinary care. And it is entirely clear that it constituted a failure on his part to exercise that very high degree of care required of him under the circumstances. We say that the negligence of the agents and servants of the Evansville Road plainly and boldly stands out from the evidence adduced by petitioner itself in an effort to carry the burden resting upon it and to exonerate itself from liability.

In this connection petitioner refers this Court to the case of **Gray v. Baltimore & Ohio R. R. Co.**, 24 Fed. (2d) 671, decided by the Circuit Court of Appeals for the Seventh Circuit. In that case the evidence showed that the switch light had been put out, the switch lock broken and the switch thrown by a negro who was subsequently convicted for the offense. The case is nowise here in point, however, for the reason that the plaintiff, by his pleading and proof, did not bring himself within the res ipsa loquitur rule. The Court (l. c. 673) said:

> "There is not in this case a general charge of negligence of the construction or maintenance of the railroad, or of any of the equipment or appliances. The first count is based upon the negligent operation of the locomotive. While the allegation is not specific as to the negligence, yet it is so far specific that it is limited to the handling of the locomotive. No reference

is made to the open switch. The second count is the special allegation that those in charge of the locomotive failed to see that the switch light was out and stop the train before it went into the open switch. The case was tried, and argued here, upon the theory that the engineer was negligent in not seeing that the light was out and in not stopping the train before he reached the switch."

"We are of opinion that the maxim, 'res ispa loquitur,' has no application in this case."

IV.

Petitioner, in its brief in support of its petition for the writ, contends, however, that it is not responsible for the negligence of the agents and servants of the Evansville Company. In our original brief in opposition to the petition for the writ we undertook to briefly show that petitioner's contention in this regard is entirely without merit. We there pointed out that **this switch stand and signal device with which it was connected, and the mechanism employed therewith, constituted as much an integral part of petitioner's road and equipment as did its cars, rails or roadbed. It was an instrumentality of carriage.** The light standard or target, indeed, belonged to petitioner (Tr., p. 103), was on petitioner's own property, and was maintained, inspected and repaired by petitioner (Tr., pp. 121, 124). It was an instrumentality appurtenant to petitioner's main-line track, upon the proper operation of which depended the lives and safety of the passengers that petitioner undertook to carry over such line.

From the evidence adduced by petitioner it appears that petitioner permitted the employes of the Evansville Road, in operating the latter's trains over a portion of petitioner's main line, to operate this switch and signal device, without taking any precautions whatsoever to guard against the careless or improper operation thereof by such employes, and without taking any care whatsoever for the protection of its own passengers on its own main line, so far as concerns the signals given by this target. And petitioner's counsel appears to contend, in all seriousness, that petitioner could thus leave the operation of this instrumentality of carriage, on its own main line, to the employes of another company and thereby divest itself of all liability to its own passengers for the negligent operation thereof.

In the Court of Appeals, as well as in this Court, petitioner has placed reliance upon such cases as Arrowsmith v. Railroad, 57 Fed. 165; Moorshead v. United Railways Co., 119 Mo. App. 541, same case, 203 Mo. 121, and other cases of like character, involving the liability vel non of a lessor railroad company that leases its entire road and equipment to another company, surrendering all possession and control thereof, where such lease is authorized by legislative authority. The question whether a lessor company that has surrendered all possession and control of its entire roadbed, rolling stock and other equipment, under a lease sanctioned by legislative authority, remains liable for the negligence of the lessee in the operation of the road, is a matter that is here in nowise involved. There

is a conflict of authority on the subject, and with such contrariety of opinion we are not here concerned. **This is not a case in which it is sought to hold petitioner liable for the negligent operation of its road by a lessee to whom it has turned over full possession and control thereof.** In this case there was a **joint occupation and user** of a small portion of petitioner's main-line track by petitioner and the Evansville road, under a contract between the two roads whereby petitioner allowed the Evansville road to connect with its main line at Mine Junction and to run trains from that point eastwardly to Oakland, a distance of about ten miles, where there was another connection with the Evansville road. In our original brief in opposition to petitioner's petition for the writ we cited a list of cases holding that a railroad company is liable for injury to its own passengers occasioned through the negligence of another company jointly using its line or a portion thereof. The leading case is that of Illinois Central Railroad Co. v. Barron, 5 Wal. 90, 18 L. Ed. 590, which was discussed in our original brief; and the rule of law underlying the Barron case has been recognized and applied in many other cases, among them Denver & R. G. Ry. Co. v. Roller, 100 Fed. 738; Central Trust Co. of N. Y. v. Colorado-Midland Ry. Co., 97 Fed. 239, affirming 89 Fed. 560. And we there point out that **there is a very marked distinction between cases of the character just mentioned, involving the joint use and occupation of a line, or a portion thereof, by two railroad companies, and those in which**

it is sought to hold a lessor company liable where, by an authorized lease, it has leased its entire road and equipment to another company, surrendering all possession, control and right of operation thereof (1 Elliott on Railroads, 3d Edition, Sec. 551, p. 779).

But in the instant case the liability of petitioner for injuries to its own passengers, by reason of the negligence of the employes of the Evansville road in the operation and management of its switch and signal device, does not depend by any means upon the principle enunciated and applied in the Barron case and the other cases that have followed it. This for the reason that in the Barron case, supra, the Roller case, supra, the Colorado-Midland case, supra, and all of the other cases of that type, the defendant railroad company was held liable to its passengers for injuries occasioned by the negligent operation of trains by another company having running rights on its road; whereas, in the instant case, the collision which caused respondent's injuries was occasioned by the negligent operation of an instrumentality of carriage belonging to the carrier, appurtenant to its own main line, the operation and management of which had been entrusted to the agents and servants of another company, with no precautions whatsoever taken to see that such instrumentality was carefully and properly operated.

In other words—leaving out of consideration, for the moment, the fact that, in any event respondent made a case for the jury under the res ipsa loquitur rule—the

question is whether petitioner, Southern Railway Company, is liable to respondent **for injuries received by reason of the negligent and careless operation of its own signalling device, on its own main line, over which it was transporting respondent as a passenger.** Petitioner contends that, though this signal device was one of its own instrumentalities of carriage, a thing immediately and directly appurtenant to the proper and safe operation of its trains over its main line, it could, nevertheless, turn over the operation thereof to the employes of another company having the right to connect with its road and the right to the joint user of a portion of petitioner's road without becoming liable to its own passengers for injuries resulting from the negligent operation thereof.

We respectfully point out that petitioner has not cited a single case in which any court has ever held that a railroad company may turn over the operation and management of any of its own instrumentalities of carriage to another road, jointly using some part of its road with it, and escape liability for injury to its own passengers by reason of the negligent operation or management of such instrumentalities of carriage.

In its original brief petitioner refers to the case of **Stoddard v. Railroad,** 181 Mass. 422, in which it was said by Mr. Justice Holmes that the liability of a carrier to a passenger is based upon fault. The case does not in anywise support petitioner's contention, but, on the contrary,

refutes it. The nature of the case appears from the following syllabus, viz.:

> "A railroad company having contracted to transport the mails and the postal clerk in accordance with the United States postal regulations, is not liable for an injury to such clerk while remaining in the postal car which had been switched onto a sidetrack in a union depot at the termination of its journey, by reason of the negligence of the servants of another corporation in taking another car onto such track."

In the course of the opinion the Court said:

> "The contract of carriage is interpreted as applying to the **instrumentalities of carriage** even when belonging to others, so far as to make a carrier answerable for their negligence. * * *" (Emphasis ours.)

The Stoddard case is consequently pointed authority in support of respondent's contention that the petitioner, Southern Railway Company, is liable to respondent for injuries sustained by him in a collision resulting from the negligent operation or management of one of petitioner's own **instrumentalities of carriage**, on petitioner's main line, over which petitioner was transporting respondent at the time; that petitioner would be liable for the negligent operation of such **instrumentality of carriage** whether it belonged to petitioner or to another, and whether petitioner undertook to operate it through its own employes or left the operation thereof to the employes of

another carrier jointly using a portion of its road. In other words, as said in the Stoddard case, the contract of carriage between the petitioner and this respondent is interpreted as applying to such instrumentalities of carriage. And it cannot be gainsaid that a switch and signal device such as that here in question is as much an instrumentality of carriage as the cars, rails or roadbed of the carrier.

V.

In this connection it is contended by petitioner that under the Indiana statutes pleaded in its answer petitioner was bound to permit the Evansville Company to connect with its road at Mine Junction, and that therefore petitioner cannot be held liable for the negligence of the employes of the Evansville road with respect to the operation of this switch and signal device. But this is obviously a non sequitur. Assuming, arguendo, that these statutes required petitioner to permit the Evansville road to make such use of its tracks, it is entirely clear that petitioner was not thereby either required or authorized to turn over to the Evansville road the operation of its own switch and signaling devices on its main line, without taking any precaution to see that they were carefully and properly operated and thus escape liability to its own passengers for the negligent operation thereof.

Referring to these statutes, we desire to again point out, as we did in our original brief, that Sections 12808, 13106

and 13079 of Burns' Indiana Statutes 1926, which are set out on pages 45, 46 and 47 of petitioner's original brief in support of its petition for the writ of certiorari, **were not pleaded** in petitioner's answer below, and were not, of course, offered in evidence and are not in this case. The sections of the Indiana statute pleaded are Sections 12931, 13206, 13207 and 13208 of Burns' Annotated Statutes 1926. These statutes, upon their face, apply to railroad companies **incorporated under the laws of the State of Indiana**; whereas the record affirmatively shows that **petitioner is a corporation existing under and by virtue of the laws of the State of Virginia.** (See petition for removal, Tr., p. 8.) But, if we assume that these statutes have any application, it is entirely clear, we submit, that they do not in anywise affect the question of petitioner's liability to respondent for injuries received by the latter while a passenger upon petitioner's train caused by the negligent management or operation of one of petitioner's own **instrumentalities of carriage**, namely, a switch and signal device, on its own main-line track. It is unnecessary to set out these statutes here at length. They appear on pages 13 and 14 of petitioner's transcript of the record. The sixth subdivision of section 12931, supra, purports to give to a railroad company incorporated under the laws of Indiana the right to cross and unite its railroad with any other railroad before constructed at any point on its route, etc.

Section 13206, supra, provides as follows:

> "All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said railroad companies may agree."

Section 13207, supra, purports to ratify all contracts of the character mentioned in section 13206 which had been theretofore made in good faith between railroad companies organized under the laws of Indiana.

Section 13208 provides as follows:

> "Every railroad that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

While section 12931 permits a domestic railroad company to unite its road with that of another, and section 13206 authorizes domestic companies to enter into contracts with other companies for the joint user of the tracks

and roads of such companies, **it is entirely obvious that these sections do not in any way purport to relieve a railroad company from liability to its own passengers for injuries received through the negligent operation or management of any of its own instrumentalities of carriage,** no matter how many lines may make connections with its road or may have a joint right of user thereof.

And section 13208, supra, simply provides that a railroad running and operating its trains over the road of another company shall be liable to third persons for the negligent operation thereof as though it owned the road over which it is operated.

In other words, there is nothing to be found in these Indiana statutes that may by any possibility be construed as attempting to relieve petitioner from liability to its own passengers for injuries received by reason of the negligent operation of its own instrumentalities of carriage. **Asssuming that the Indiana statutes required petitioner to allow the Evansville road to connect with and jointly use a portion of its line, it is entirely clear that such statutes do not in any way purport to authorize petitioner to surrender to any such other road the operation and management of its own instrumentalities of carriage and thus relieve itself of liability to its own passengers.**

In this connection petitioner, in its original brief in support of its petition for the writ, cites and quotes from the case of **New York, N. H. & H. R. Co. v. Baker,** 98 Fed. 694, in support of petitioner's argument that petitioner

was bound under the Indiana statutes to allow the Evansville road a connection at Mine Junction and the right of joint user of a part of petitioner's road, and that, therefore, petitioner is not liable for any negligence of the employes of the Evansville company in operating petitioner's own switch and signal device, constituted an instrumentality of carriage appurtenant to its own main line over which it was transporting respondent as a passenger. The Baker case, we respectfully say, affords no support whatsoever for this contention.

In the Baker case plaintiff's wife was injured while a passenger on one of defendant's trains which was being operated from Mt. Vernon to Grand Central Depot in New York City, and was injured by reason of the swinging of the boom of a derrick which was being operated near the track, causing a portion of the tackle to strike one of the windows of the car in which plaintiff's wife was riding. The Legislature of New York, having determined to raise the grade of the railroad bridge at Harlem River and the approaches thereto, provided for such changes to be made by legislative act. The Legislature took the work entirely out of the hands of the railroad company and provided and directed that the work should be done by an independent board which was created for that purpose, in the creation of which the defendant railroad company had no voice and over whose employes it had no control. The railroad company had no control over the work and no means whatsoever of supervising the same. It was in such

a situation that the Court observed that through the cases referred to in the opinion ran the idea of choice—the power to act or refrain from acting. The Court said that the railroad had no choice left to it; that the state intervened and directed that the work be done by this independent board, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent; that consequently, the railroad company was not liable for the negligence of the employes of the board in respect to the operation of this derrick.

It will be observed that there is a wide distinction between the Baker case and the case at bar.

First. In the Baker case, unlike the present case, there was no joint user of tracks or other instrumentalities of carriage.

Second. In the Baker case, the statute commanded the work be done by a board over which defendant railroad had no control, or even the slightest supervision. The Court in the Baker case said (l. c. 696):

> "As to so much, however, as lay south of the Harlem River, which included the location of the accident, it took the work entirely out of the hands of the railroad company confiding the execution, direction and superintendence of the work to a board, * * *."

In the present case the Indiana statute makes no provision nor reference whatsoever as to how the connection

or the switch and signal devices shall be maintained or operated and controlled. Indeed, as a matter of fact, and as shown by petitioner's own evidence, the petitioner in the present case exercised **control** and **superintendence** in the following respects:

(a) Petitioner itself inspected and repaired the switch, light standard, etc., from time to time.

(b) The petitioner's equipment, i. e., switch, light standard, etc., was used.

(c) The E. I. & T. H. trainmen and other employes were under the direct supervision and orders of the petitioner's dispatcher and could move only upon his order and permission.

In the instant case respondent, while a passenger upon petitioner's train, operated on its main line, was injured because of the negligent operation or management of one of petitioner's own instrumentalities of carriage on such main line, the operation of which petitioner was not, by statute or otherwise, required to turn over to the employes of another road, or to any board or other independent agency.

As said in the Stoddard case, supra (181 Mass. 422), **petitioner's contract of carriage with respondent is to be interpreted as applying to every instrumentality of carriage appurtenant to the line over which petitioner was carrying respondent as a passenger.** And it matters not whether petitioner was actually in control of and operating

this switch and signal device through its own employes, or whether it left the operation and management thereof to the employes of another company; it remained liable, in any event, to its own passengers for any negligence in the operation thereof.

Nowhere in the Indiana statutes pleaded is there any intimation that a railroad company whose road is intersected by or to any extent used by another company may be permitted to surrender to such other company the operation and management of its own instrumentalities of carriage and thereby escape liability to its own passengers for the negligent operation and management thereof. Indeed, there is nothing in any of these Indiana statutes that in anywise purports to prevent this petitioner from exercising full and complete authority and supervision over its switch and signal devices at such connecting points appurtenant to its own main-line track, constituting essential and integral parts of its system—instrumentalities of carriage essential to the operation of its own trains. Petitioner had the full, unlimited right and authority to supervise and control the operation and management of the signal device here in question. This it did not do, but simply left it to the crew of this freight train to see that the switch was closed and that this signal device was working properly. This crew, employes of the Evansville Company, negligently opened this switch and left it open for twenty or twenty-five minutes, with the signal light showing green, showing a clear track to the engineer of petitioner's train,

while they calmly sat down a few feet away and waited for the passenger train to take the siding and plunge into the freight train.

In closing, we again refer to the case of McElroy v. Railroad, 4 Cush. (Mass.) 400, where the casualty occurred by reason of the negligent operation of a switch, which, under an arrangement between the defendant and another road, was provided for and attended by a servant of the latter company at its expense. The Court, in part, said:

> "The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendant's road, over which they must necessarily carry all their passengers, and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell Railroad, **and it was within the scope of their duty to see that the switch was rightly constructed, attended and managed before they were justified in carrying passengers over it.**" (Emphasis ours.)

For the reasons shown above, respondent prays that the writ of certiorari heretofore issued herein be quashed.

Respectfully submitted,

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